PROSPERITY WITH JUSTICE—WORKING TOWARD A SOLUTION.

BY JUDGE PETER S. GROSSCUP.

ORIGINALLY property was strictly individual. As civilization advanced the copartnership, the earliest form of "combination," appeared—the union of two or more persons in a single effort. In copartnership expense and waste were cut down, and incidentally competition was partly eliminated, but the general advantages were such that it received the favor and protection of the law.

Civilization becoming more complex, the corporation came—a closer union than the copartnership, of several persons in a single venture—a union so close that the corporation became itself, in contemplation of law, a single artificial person. And civilization becoming still more complex, the so-called Trust came—in its earlier form simply a copartnership of these new artificial persons, the corporations—the medium being some committee of individuals or some trust company who, receiving all the net earnings of the several corporations, divided them among the stockholders of each. Examples of this kind of corporate copartnership were the original Standard Oil Trust, the Sugar Trust and the old Chicago Gas Trust. Other instances were the railway pooling arrangements. And here the country took alarm; copartnership of individuals was all right; the closer union of individuals in a corporation was all right; but copartnership of corporations (themselves essentially copartnerships)—this union of unions—where would this multiplication of union by union end? And what effect would it have on competitors, who continued such as individuals, or in the simpler forms of the primary corporations and upon the public as consumers? The answer was the so-called anti-trust acts in every State and the Sherman anti-trust act for the nation.

The constitutionality of these anti-trust acts was sustained by the courts, and some of the trusts, notably the original Standard Oil Company and the Chicago Gas Trust, were judicially dissolved. Others voluntarily dissolved. These dissolutions, however, did not relegate, except for a brief period, and then only in theory, the copartner corporations to their original basis. Renewed competition was not secured. Instead many of the corporations (artificial persons), forcibly divorced by the law from each other, disappeared altogether, only to immediately reappear in a greatly enlarged corporation (artificial person)—large enough to include every asset and every participating stockholder involved in the dissolution; that is to say, the divorced corporations first dissolved themselves into their original elements and then reunited in a single corporation large enough to include everything that had dissolved. And in this new union they are among the greatest combinations (all copartnerships and corporations being combinations) that the country contains.

But this was not the course taken by all these corporate copartnerships. Finding a State that was willing to incorporate anything tangible or intangible, present or to come, and being advised that a State corporation was a "person" that would have the same power the country over, as a natural person could constitutionally claim, many transformed themselves from the status of "copartnership of corporations" into "holding companies"; in other words, finding that an outright copartnership of corporations was illegal, they *incorporated* the copartnership, on the suggestion that *that* would make it legal. And many later enterprises in setting up for business have acted upon this theory. Then came the question in the courts as to what was the status before the Sherman law of these holding companies.

The significance of the Northern Securities Case was that, as to quasi-public corporations at least, the mere incorporation of what essentially remained a copartnership of corporations does not make such copartnership valid; and the significance of the recent Standard Oil decision is that that doctrine is carried forward to private corporations as well. Should the later decision be affirmed, the holding company, as a way to get around the illegality of copartnership of corporations, where the necessary effect is to restrain trade, is at an end. Natural persons continue to have the legal right, under the law as it now stands,

to unite their efforts either in the form of a copartnership or the closer union of the primary corporation. But there can be no extension of this right of union where the effect is necessarily to restrain trade; there can be no union of unions.

We are now in the twentieth year since the enactment of this Sherman Anti-trust Act. The State anti-trust acts immediately preceded and followed the Sherman Act. What, then, is the practical result of this campaign, State and national, of nineteen years? On its purely legal side the outcome of this campaign is that if a number of persons, with a large amount of capital, or with a large borrowing capacity at the banks, desire to unite in enterprises as large as enterprises have grown to be, they must do it through the medium of *one* corporation, itself not the union of several corporations; for though the Sherman Act makes illegal any "contract," "combination in form of trust or otherwise," or "conspiracy" to restrain trade in interstate commerce, no court has held that such "contract," "combination" or "conspiracy" can be between less than two or more persons. The terms themselves imply two or more parties. If a corporation then, no matter what may be its size, is in contemplation of law but one person, this provision of the Sherman Act does not apply. That is to say, five corporations or copartnerships, made up of five persons each, uniting in the form of a contract, trust or conspiracy to restrain trade, would be within the Act; but the same twenty-five persons united, with all their assets in one original corporation, would not be within the statute. In the one case the transaction would be a "contract," "combination" or "conspiracy" between two or more copartnerships or corporations (artificial persons); in the other case it would be a single person—artificial it is true, but in contemplation of law, and therefore of the Sherman Act, one person. This is aside from the second section of the Sherman Act, however, the subject-matter of Judge Hook's opinion, which is a section dealing with actual "monopolies," and not with "contracts," "combinations" and "conspiracies" whose necessary effect is merely to restrain trade; and Judge Hook's opinion is his separate opinion, not that of the court.

This is what these nineteen years have brought forth on their purely legal side. How about the practical business side? Combination is industry systematizing itself; industry cutting out

waste and expense; industry gathering itself together, that it may work with united strength; industry equipping itself, that it may utilize the commanding power that the human mind has obtained over the forces of nature; and the natural law of economics, under such incentive, is not inclined to look at statute law except in search of ways to escape it. The result has been that on their business side these nineteen years have witnessed a transition not *away* from consolidation, but *towards* it—consolidations of railroads and industries on a scale that no one dreamed of nineteen years ago. Indeed, more than any other single influence, the Sherman Act, instead of halting the process of consolidation, has brought about the enormous corporations we have to-day.

Now, what shall the next stage be? Shall we continue to be satisfied with a change in form, leaving the substance to go on in its own inherent way, or shall we begin to deal with the substance of things, adopting mere forms as the means and not the end of the efforts made? So far as national law on the subject now goes, the States probably have the power immensely to harass foreign corporations, or bar them out of their territory altogether, by making conditions to their entry that they could not fulfil. And by national law itself persons "not natural" might possibly be prohibited from entering into interstate commerce—two ways (constitutionality doubtful) of getting rid of large consolidations. But would either of these ways in the long run pay? As an economic agency—aside from any consideration of unfair prices exacted, and aside from the fact that through it a small class of men are rapidly acquiring America's most valuable domain of property—these consolidations have made it possible to better the condition of livelihood of every man, woman and child that lives to-day. Now if these "asides" can be eliminated without pulling down the structure, what sane man will be looking for a Samson to pull down the structure?

Can these "asides" be eliminated? Can any way be found to obtain the economic advantage that consolidations have brought to civilization *pruned of the wrongs* they have brought with them? For the purpose of considering this, corporations can be divided into two distinct classes: first, those that substantially are monopolies, and, second, those that still are subject substantially to the law of competition. The first class or those

that substantially are monopolies are the ones chiefly to be dealt with and may again be subdivided into

"(*a*) those that are monopolies because they ought to be monopolies (the public mind on this subject has changed in the past few years), such as railways, telegraph and telephone lines, street and interurban railways, water, light and other public utilities, and (*b*) those that by the acquirement of all, or nearly all, the nation's available resources, or by obtaining otherwise decisive control in any department of industry, have made themselves monopolies."

Now the two prime objects to be obtained—the two "asides" to be eliminated—are:

"(1) That the corporate form of carrying on enterprise shall not impose upon the people at large burdens in the way of prices that ought not to be suffered; and (2) that the corporate domain, as a form of holding property, like the farms of the country, should be taken up by the people at large, not indirectly, as at present, but as direct proprietors."

To meet the *second* of these objects, no adequate proposal has yet come from those who have the lawmaking power in their hands. "Federal incorporation" will be no remedy, if by that it is meant simply to incorporate at Washington the free-for-all, go-as-one-pleases corporate structures that now emerge from most of the State capitals. To meet the *first* of these objects—that unfair prices shall not be imposed upon the public—two proposals have been made—viz., that in the case of quasi-public corporations the rates shall be under the regulation of the Government, and that as to industrial enterprises that have made themselves monopolies (competition being a cure for monopoly) the tariff laws shall be so adjusted that the area of competition shall be made world-wide.

My own experience, sitting in the United States Circuit Court, has taught me what a complex problem regulation of railroad rates by Government is. In the first place there is (and in a country as yet so unevenly populated and developed there can be) no common unit, measuring-line or principle, as "per pound, per mile" or the like, that is uniformly applicable; for a rate that would be excessive in some parts would be so inadequate in others that it would bar out transportation facilities altogether. Indeed, new industries and new communities have been set on their feet by initial rates so low that, for the time being, and considered by themselves, they were a loss to the carrier;

and ocean and other waterway rates complicate the matter. Then, too, in the absence of a definite valuation of the carrier's investment, there is no common denominator upon which to calculate whether given rates by the carrier are reasonable or not. Indeed, in the absence of a common measuring-line and a common denominator of value, rate-making is at most a mere guess. And in addition to this, to take from the carriers themselves, each dealing with its own constituency, and each depending upon the prosperity of its particular constituency for its own revenue, the power of initial rate-making—turning it over to a body of men whose knowledge on the subject is largely academic—would, in my judgment, be much less satisfactory than (the incentive to overcharge being removed) the direct relationship of carrier and shipper, living with each other day in and day out and mutually understanding each other's needs. I do not mean by this to put my voice, what little it is worth, against the regulation of rates suggested. What I mean is, that put into force that suggestion will be no sure "cure-all" of all the evils.

To recur to the larger question, then, here is the situation as I see it: within the vast field of transportation, where in the nature of things the operating agencies must be monopolies, the Sherman Act as a last effort to maintain competition and thereby to regulate prices, has come to the end of what it can accomplish; for as against consolidation in the way of a single corporation (one person, artificial it is true, but still within the law a "person") no effort has yet been made to use the Sherman Act. And within the vast field of industry, where, by their acquirement of deciding control, the operating agencies have made themselves monopolies, the Sherman Act, as a last effort to maintain competition and thereby regulate prices, has also come to the end of what it can do. But within these vast fields the law of competition, as the one thing standing between a nation of consumers and the producers from whom the nation of consumers is forced to buy, is at an end also. To the extent that these monopolies are quasi-public corporations, rate regulation by Government may be of some avail; but at best it will be unsatisfactory. To the extent that they are industrial enterprises, the opening up of world competition by an adjustment of the tariff may be of some avail; but some of these enterprises are fortified against world competition. What, then, is the remedy?

The Anglo-Saxon mind habitually holds fast to that which is old and has been tried. But sometimes that which is really new creeps behind the shield of the old and the tried. Monopoly, as a necessary product of our new civilization, is itself new. The man who has his labor or his services to sell must sell at what the world determines to give. *That* is the old and the tried. The manufacturer who is in a field where competition still controls must sell at what the world determines to give. The middle man may think he is fixing his own prices (within a narrow margin, he is), but in all substantial respects it is the world that determines what his profits shall be. Over us all, save and except those who have obtained for themselves the deciding voice, the world holds the deciding voice. But in the case of those who have "obtained for *themselves* the deciding voice"—is there anything of the "old and the tried"? Sometimes I wonder if behind all the ineffectual effort we have put forth to find a remedy for these new conditions, *in line with the old and the tried,* however, the public mind is not silently perceiving the ultimate remedy—juster, more effectual, and in accordance, too, with the *spirit* of the old and the tried—holding back from putting the remedy into words because the public mind is not ready as yet to put what it is thinking about into words. Let me put it into words, that it may be openly considered, at least, if not accepted.

First: Let there be a valuation of each of the railway properties (I take the railway properties as an illustration only), rejecting "the cost of reproduction" as the measure, but taking as the measure what it fairly cost to bring these railroads to their present condition. Add to this, as time goes on, the cost of extensions and such improvements as ought to go to capital account; and upon the capital that the two thus constitute—a capital that is definite—allow returns at a definite given rate, after making provision for depreciation, maintenance and the improvements that are rightly chargeable to operation and not to capital account.

Second: The traffic rates now charged the public by the carriers are on file with the Interstate Commerce Commission. Take these, or such rates as are on file when the foregoing change goes into effect, as the second definite postulate; and ascertain at given intervals what the public has *saved,* if anything, by the applica-

tion of reduced rates, instead of the previous rates, to the traffic carried during the preceding period.

Third: A saving to the public having been shown, allow the carrier out of the accumulation, if there be any, and if the reduction be not at the expense of quality of service, as a return additional to his fixed return, a certain percentage of such savings (the maximum to be definite), as also possibly for a security fund against the "lean years," this maximum also to be definitely fixed; allow the Employee's Insurance and Old-Age Pension Fund another percentage; and the Employee's Investment Account another percentage, to be invested for them *and as their property* (the apportionment to be according to age and length of service) in any authorized future issues of securities of the carrier for extensions or improvements.

Fourth: Should it appear on such periodical accounting that the carrier has accumulated out of the rates charged the public, over and above the needs above set forth, and the constant bettering of the service, further amounts, the same shall go into the United States Treasury, *unless within a succeeding given period it shall have been absorbed in a still greater bettering of service or a reduction of rates of traffic charged the public.*

To the objection that this is a tax levied upon the carriers for the benefit of the public treasury, the answer is that it is a tax that will *never accrue,* for by reducing rates and bettering service (both the self-interest of the carrier) no balance need remain. The provision is a menace, not a tax.

To the objection that the carriers are thus left to fix their own traffic rates, the answer is that all pecuniary interest being taken out of *increase* of rates, the carriers can be safely left to fix them, initially at least, subject to supervision against discriminations.

To the objection that enterprise must have some prospect ahead, the answer is that there are actual, tangible prospects in the increased dividends provided. True, they depend upon reduction of rates, but reduction of rates is a sequence of improved methods, wastes cut out and expenses reduced, and especially a sequence of constantly growing populations tributary to the lines.

To the objection that the proposition is revolutionary—that it is the first time in our American history that it is proposed to set a limit upon success or what success may earn, the answer is

that this is the first time in American history that the public have been seriously called upon to inquire whether that character of success, which would not be success at all except for the State's granting of the privilege of incorporation, has any natural right to go forward without limit; and that this, too, is the first time that the people have been called upon to inquire whether a policy that subjects corporations, free from competition, to public control over what shall be their returns, is not more nearly akin to the old economic law that he that has anything to sell must take what the world determines to give, than would be a policy that forever leaves it for these exceptional corporations to say that what *they* have to sell the world must take without a word as to what it thinks it ought to give. Besides, in the case of the carrier at least, a limit on earnings to be appropriated as returns is not different in principle from the limit on rates that the Government is now exercising. The difference is one of method, not one of eventual result.

I submit the remedy thus outlined as the logical and the most promising next stage in the progress of events that have brought us to where we now are. It is applicable to those combinations that have made themselves monopolies, as well as to the natural monopolies—the anti-trust acts being left to act upon those enterprises that have not become monopolies. But I would not apply it where tariff revision would restore competition; tariff revision, therefore, is bound up with this corporate remedy. There is much, of course, in the outline to fill in, especially in means calculated to secure no depreciation in quality; but I believe that fully developed this plan can make it to the self-interest of the corporations dealt with not to depreciate quality. There is in this plan no interference with private right; the corporation is not a private person, and it can claim none of the so-called "natural" rights of private persons. And, on the other hand, there is in this plan no interference with the corporation's legitimate "business management" of its own affairs —the management of the corporation's business is left in the hands of its own managers. The central thought of the plan is co-operation of self-interest with justice; justice obtained through natural law; enterprise in the hands of individuals carried on by those who win their places by adaptability, as against enterprise carried on by Government; development along natural

lines, subject only to the restrictions that the world always has laid and always ought to lay on palpable injustice. The plan put into effect, it seems to me, would remove those acute antagonisms —do away with the border warfare—between the people and these great enterprises; and in the doing away with border warfare—supplemented by a reconstructed corporation policy, State and National, that would secure the holders of corporation securities, against the dangers that lie not only in overissues of securities, but in the unrestrained manipulation of securities and in misuse of the power of declaring dividends such as mulcted the public in the old Chicago street-railway securities—would immediately tend to bring the people into direct ownership of this class of property, just as the Western lands were taken up by the people the moment the frontier garrisons were supplanted by the agricultural school and the county fair. And peace restored, and with it justice, men would begin to think more of achievement measured by service than of achievement measured by what one has accumulated. To great enterprise-builders, and to those great in their operation, would come the better kind of honor and satisfaction which comes to those who are great in other walks of life. And this America of ours, so rich in ideals and human tenderness, would turn its creative vitality into channels infinitely more helpful than these continual contests between the bare talent for money-getting, on the one hand, and the instinct, wide as human nature, on the other, that no one class of men shall become the possessors of the earth.

There are a few groups of men in this country, composed each of comparatively few men, who, from their grasp upon our growing corporate domain, have taken out in *personal fortunes* in the past ten years sums approaching in greatness all that has been collected by the Government of the United States through every avenue of its power to tax. The means that enable these groups of men to put themselves upon a level with the Government as collectors of revenue from the people, besides the tariff, is the grasp they have held on the country's resources, through the right of unconditioned incorporation, that our corporate policy heretofore has granted them. Under this license these groups of men have capitalized in advance, and distributed among themselves as their own property, everything that discovery and invention (the work of the whole world) was destined in an in-

ventive age to bring, and everything that the advance of economic science (again the work of the whole world) was destined in a progressive age to do. And the tariff has been employed to augment still further these unparalleled advantages.

From these groups I would not take one farthing of what they have accumulated. From the property into which these profits have gone, turning the original water in many instances into the wine of approximately actual value, I would not take one farthing. Let the past bury the past. What was done by these men was done under policies put into law by ourselves. But here and now I would have these *policies* stopped. They can be stopped now without shock; and once the country is put upon a juster basis of prosperity, the anomalies that these policies have brought forth will shortly disappear. They can be stopped, too, without infringement, on the precept that to him that has given much to mankind in the way of successful effort shall be given a corresponding individual return. But after ten years more, who can tell at what cost to the nation's strength, and to the nation's peace, and to the whole doctrine of legitimate individualism, any halt in these policies can be made effectual?

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